Editor's note: 78 I.D. 193

UNITED STATES
v.
WAYNE WINTERS d/b/a
PIEDRAS DEL SOL MINING COMPANY

IBLA 70-43 Decided June 2, 1971

Mining Claims: Discovery: Generally

The prudent man test of discovery of a valuable mineral deposit does not require present profitable mining operations, but it does require evidence of sufficient mineralization to justify a prudent man in expecting to develop a valuable mine with profits from sales over the expected cost of the operation, and the claimant's unfounded conjecture that the price of gold will increase in the future is not a relevant consideration.

Mining Claims: Discovery: Generally

In a mining claim contest, a showing of mineralization which might justify further exploration for minerals but not development of a mine is not sufficient to satisfy the prudent man test.

Mining Claims: Hearings -- Rules of Practice: Evidence -- Rules of Practice: Hearings

Evidence tendered on appeal in a mining contest case may not be considered except for the limited purpose of deciding whether a

further hearing is warranted, since the record made at the hearing must be the sole basis for decision.

Administrative Procedure Act: Burden of Proof -- Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally

Government mineral examiners determining the validity of a mining claim need only examine the claim to verify whether the claimant has made a discovery; they are not required to perform discovery work, to explore or sample beyond the claimant's workings, or to rehabilitate alleged discovery cuts to establish the government's prima facie case.

Administrative Procedure Act: Burden of Proof -- Mining Claims: Contests -- Mining Claims: Discovery: Generally -- Rules of Practice: Evidence

In a government mining contest, where the contestant has made a prima facie showing of lack of discovery, the burden of producing preponderating evidence of the existence of a valuable mineral deposit sufficient to support a discovery is upon the claimant, and he cannot secure a determination that the claim is valid merely by attempting to discredit and impeach the government's witnesses.

Mining Claims: Discovery: Generally -- Mining Claims: Hearings -- Rules of Practice: Evidence -- Rules of Practice: Hearings

New evidence tendered on appeal is not sufficient to justify further evidentary proceedings, although it might discredit

testimony by government mineral examiners that two of their samples of a placer mining claim were taken to bedrock, where there is no tender of proof showing that the alleged greater mineral values at bedrock actually exist and the record does not show evidence of sufficient gold to warrant a prudent man to anticipate development of a valuable mine.

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IBLA 70-43 :	Arizona Contest A-1183	
	:	
UNITED STATES :		Placer mining claim
v.	:	declared null and void
WAYNE WINTERS d/b/a	:	
PIEDRAS DEL SOL MINING COMPANY	:	Affirmed

DECISION

Wayne Winters, d/b/a Piedras Del Sol Mining Company, has appealed to the Secretary of the Interior from a decision by the Office of Appeals and Hearings, Bureau of Land Management, affirming a hearing examiner's decision of August 13, 1968, holding Winters' Oro Escondido placer mining claim null and void for lack of discovery of a valuable mineral deposit.

The mining claim was located October 13, 1962, embracing the SE 1/4 SE 1/4 SE 1/4 sec. 19, T. 23 S., R. 11 E., G.&S.R. Mer., Arizona, within the Coronado National Forest. Contest proceedings were initiated at the request of the Forest Service. The decisions below concluded that insufficient gold was shown within the claim to warrant a prudent man to further expend time and money with the expectation of developing a valuable mine, Castle v. Womble, 19 L.D. 455, 457 (1894).

Appellant does not dispute the "prudent man test," which has been approved by the Supreme Court. Chrisman v. Miller, 197 U.S. 313 (1905); Cameron v. United States, 252 U.S. 450 (1920); Best v. Humboldt Mining Company, 371 U.S. 334 (1963); and United States v. Coleman, 390 U.S. 599 (1968). He contends, however, that the Bureau applied the test too stringently to the facts. He asserts that the Bureau is requiring the claimant to prove that a profitable mine will be developed and that this is not required. Appellant contends generally that the Bureau decisions deny him due process by merely advocating administrative policies rather than being supported by record evidence. He also asserts that the Forest Service failed to establish a prima facie case that there was not a valid discovery, and that he proved by preponderant evidence that a valid discovery was made.

On March 3, 1971, on appellant's motion, oral argument was presented to this Board. It was argued on behalf of appellant that the Government's expert witnesses were incompetent to testify with regard to the conduct of a prudent man in these circumstances; that they were not qualified experts on placer gold mining; that they were biased and neither diligent nor impartial in the taking of samples; and that, consequently, their testimony was inadequate

to establish a prima facie case of invalidity. It was also argued that ample evidence of a valid discovery was adduced at the hearing. Counsel for the contestant presented argument in rebuttal.

The main thrust of appellant's case is an effort to discredit the testimony by the Forest Service's witnesses. Appellant contends that the Forest Service mineral examiners gave false testimony concerning their taking of samples to bedrock. He further adverts to the testimony tending to show that the samples were taken, handled and processed in such a manner as to lose much of their gold content. Accordingly, he argues that no weight can be given to any of their testimony and that the Government thus failed to establish a prima facie case. In support of this contention, appellant on appeal submitted an affidavit from Verne C. McCutchan, State of Arizona mine inspector, and two photographs identified as sample nos. 3553 and 3556. He alleges that this affidavit proves the Forest Service witnesses failed to sample to bedrock on those sample cuts, contrary to their testimony at the hearing.

Appellant's argument, supported by the aforementioned affidavit and photographs, raises a real doubt that samples 3553 and 3556 were cut to bedrock, and are, therefore, representative

of values which might otherwise have been disclosed. However, it is not the responsibility of the Government mineral examiners to do the discovery work, to explore or sample beyond the claimant's workings, or to undertake to rehabilitate alleged discovery cuts. It is the duty of the claimant to keep such discovery points available for inspection. United States v. Lawrence W. Stevens, 76 I.D. 56 (1969); United States v. Thomas C. Wells, A-30805 (January 8, 1968).

Even assuming that the mineral examiners did not sample the two cuts to bedrock, this is insufficient to show their testimony as to the other samples and their overall evaluation of the claim was in error and must be disregarded. To the contrary, such evidence was admissible and, standing unrefuted, must be accorded significant weight.

Where a Government mineral examiner offers his expert opinion that discovery of a valuable mineral deposit has not been made within the boundaries of a contested claim, a prima facie case of invalidity has been made, provided that such opinion is formed on the basis of probative evidence of the character, quality and extent of the mineralization allegedly discovered by the claimant. Mere unfounded surmise or conjecture will not suffice, regardless of the expert qualifications of the witnesses. But an expert's opinion

which is premised on his belief or hypothetical assumption of the existence of certain relevant conditions, if evidence is presented that those conditions do exist, is sufficient to establish a prima facie case and to shift the burden of evidence to the contestee. The admissibility of expert testimony in a mining claim contest is determined by the hearing examiner, who exercises a wide latitude of discretion in making these determinations.

Concerning appellant's assertion that the Government mineral examiners were not competent to testify with respect to the prudent man test, we observe that such is not a new or novel assertion. In fact, appellant's attorney presented the same line of argument in Snyder v. Udall, 267 F. Supp. 110 (1967), to the United States District Court, District of Colorado, and was obviously persuasive. However, the Court of Appeals reversed, specifically rejecting the notion that witnesses with essentially the same qualifications as those in the instant case were not competent to testify with respect to the prudent man test. Udall v. Snyder, 405 F.2d 1179, aff'd on rehearing en banc (10th Cir. 1968).

Appellant contends that the Government examiners' calculations and estimates of value of the claim are erroneous. He refers

to their estimate of 5,500 cubic yards of channel gravel within the claim. This computation was based not upon measurements from the two sample cuts which affiant states were not to bedrock, but on measurements of samples, numbers 3550, 3555 and 3551, from which estimates of width and thickness of the material above the bedrock, width of the channel gulch, and an average thickness of the gravel were derived. Not only does the affidavit fail to show these measurements and computations to be erroneous, but the record discloses no direct refutation of them. At most, one of appellant's witnesses testified that in order to determine an exact alluvial deposit there should be adequate test holes drilled. This is the type of work which a claimant should do to establish discovery. There is no evidence he made such tests. In the absence of evidence to establish a more accurate estimate of the quantity of gravel, we cannot conclude that error has been demonstrated in the Forest Service's estimation. In fact, in some respects their measurements coincide closely with some estimates given by appellant's witnesses.

Appellant contends that because of failure of the Forest Service mineral examiners to sample to bedrock on sample cuts 3553 and 3556, their calculations of a weighted average of 27.1 cents per cubic yard of gravel is grossly insufficient and in error. While the weighted average of all the samples might thereby have

been reduced, the values ascribed to the other individual samples are not affected. Moreover, we note that the weighted average of 27.1 cents per yard is in fact a grossly inflated figure. It was provided by the contestant's witness in response to cross-examination and premised upon the contestee's hypothetical assumption that (1) the weighted average reported by the examiners (17.9 cents per cubic yard) was calculated on the basis of only a 60% recovery of the gold from the examiner's samples and, (2) that 100% of the gold could be recovered. On redirect the mineral examiner estimated that he recovered at least 90% of the gold from the samples. Disregarding the evidence of values found in sample numbers 3553 and 3556, the other samples taken yielded the following values: #3550 $0.122

#3551 0.459
#3552 0.181
#3554 0.190
#3555 Assay report inconclusive
#3572 0.111
#3573 0.102
#3574 0.106

One of the contestant's expert witnesses testified that to move a yard of gravel in a small area by mechanical means and put it in a hopper of some sort for processing would cost about 40 cents. His opinion was that an operator on this claim would lose money on just the transportation of placer material to the hopper for processing.

Upon reviewing the record and hearing oral argument we find no error in the application of the prudent man test to the facts of this case. The test requires evidence of sufficient mineralization to support a reasonable expectation that a valuable mine might be developed and a profit made from sales over the reasonable cost of a mining operation. See Adams v. United States, 318 F.2d 861, 870 (9th Cir. 1963).

The testimony of the Forest Service's witness as to their examination of the workings of the claims, their estimates of the quantity of mineral, the low value of gold shown by assays of samples taken from the workings, costs of mining operations, together with information showing that the area had produced little gold over a long period of time, and their opinions that a prudent man would not expect to develop a profitable mine, adequately established a prima facie case that there was not a valid discovery of a valuable mineral deposit.

The burden of presenting a preponderance of evidence to show a valid discovery devolved upon the contestee upon presentation by the Government of a prima facie case. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Frank Coston, A-30835 (February 23, 1968). Had appellant succeeded in totally destroying the credibility of all of the evidence adduced by the contestant he would

not thereby have been entitled to a finding that the claim was valid. Absolute impeachment of the Forest Service witnesses would merely have negated the prima facie case and supported a motion for dismissal of the contest. No such impeachment was accomplished in this case. Accordingly, our next concern is whether contestant's prima facie case was overcome by the evidence adduced by contestee.

We agree with the findings in the decision below that appellant failed to show by a preponderance of evidence that there was a valid discovery. Appellant's witnesses offered their opinions that a valuable mine might be developed. However, these statements were not corroborated by specific evidence of positive mineral values or that such minerals could be extracted profitably. For example, appellant testified that there was $5,000 worth of gold in a gravel bar on the claim, which he thought would increase substantially in value by the time he retired from his present employment of editing a newspaper, when he expected to do most of the mining of the claim. His unfounded conjecture that the price of gold may greatly increase in that time is not a relevant consideration here. See United States v. Estate of Alvis F. Denison, 76 I.D. 233 (1969). Nor did he offer any specific evidence to corroborate his estimate of the present value of the deposit.

The decisions below correctly concluded that although there may be evidence showing mineralization which might warrant further exploration, this is not sufficient under the prudent man test, which requires enough evidence to justify development of a mine.

Appellant argues, in effect, that the word "exploration", when used to describe activity on a mining claim, is not automatically and invariably fatal to the claim's validity. He contends that the testimony of one of his witnesses, which the Bureau interpreted as showing only that further exploration is warranted, actually described the type of work indicated after discovery is made, as pointed out in Converse v. Udall, 399 F.2d 616, 620 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969); see Lange v. Robinson, 148 F. 799 (9th Cir. 1906) and Charlton v. Kelly, 156 F. 433 (9th Cir. 1907). The latter two cases are not in point. They involved private contests between conflicting mining claimants. In such cases the burden of proof is less than the burden upon a mining claimant when the contestant is the Government, as Converse indicates at pages 619, 620.

We agree that a mere reference in testimony to a need for further "exploration" is not, of itself, determinative of an absence of discovery, but must be considered in the proper context and in the light of the other evidence adduced. Here the contestee's

[*342] witnesses indicated that test holes should be drilled throughout a channel area in order to adequately measure the quantity of material. This was not done by the appellant. It is further argued that it must be assumed that the claim will contain greater values of gold than shown by the Forest Service witnesses, because there are greater values of placer gold to be found at bedrock. As stated by the Court of Appeals for the Ninth Circuit in Henault Mining Company v. Tysk, 419 F.2d 766, 770 (1969), cert. denied, 398 U.S. 950, "A reasonable prediction that valuable minerals exist in depth will not suffice as a 'discovery' where the existence of those minerals has not been physically established."

Even assuming the accuracy of the new matter tendered on appeal, appellant has failed to show the existence of gold within the claim in quantities sufficient to satisfy the prudent man test. If, as appellant contends, there were greater values of gold at bedrock missed by the Forest Service witnesses in their sampling, he could easily have offered evidence of his own sampling to bedrock and assay reports showing the alleged greater values. This he has totally failed to do. The one sample alluded to at the hearing by appellant's witnesses was not described clearly, nor was the assay information sufficient to support the value claimed. There was nothing to show that its alleged high value was representative

of values to be found throughout the claim. Therefore, it alone does not establish the existence of a valuable mineral deposit. See United States v. August Herman, 72 I.D. 307 (1965).

In the absence of more substantial proof, and especially in the absence of proof tending to show the existence of gold within the claim in sufficient quantities to justify a prudent man to expend further time and money with the expectation of developing a valuable mine, nothing would be gained by further evidentiary proceedings in this case.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; F.R. 12081), the decision appealed from is affirmed.

Edward W. Stuebing, Member

We concur:

Newton Frishberg, Chairman

Francis E. Mayhue, Member.